IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7504 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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RAMESHCHANDRA KANJI JOSHI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 7504 of 1995
MR MEHUL S SHAH for Petitioner No.1 & Respondent No.2
MR SP SEN AGP for Respondent No. 1 & 3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 20/09/2001

ORAL JUDGEMENT

#. Heard Mr.Mehul S. Shah, learned advocate appearing on behalf of the petitioner and respondent No.2 and Mr.S.P.Sen, learned AGP for the rest of the respondents State.

#. In the present petition, initially this Court has issued notice on 5th September, 1995 and directed to maintain status quo as on the date. Thereafter, on 13th October, 1995, this Court has issued RULE and further directed that ad-interim relief granting directing to maintain status quo shall continue till final disposal of this petition.

#. The brief facts giving rise to this petition are as under :-

The respondent No.2 was granted land of Survey No.176 / 2 of village Moti Vavdi of Jamnagar Taluka under Rule 37 of the Gujarat Land Revenue Code and an agreement in the prescribed form was obtained from the respondent No.2 on 2nd February, 1965 which provided a condition only to the effect that the grantee shall not transfer, alienate, sell etc,. the land unless it is of the entire land. Therefore, the petitioner had entered into the agreement to sell with the respondent No.2 for the sale of the land granted to the respondent No.2 and got the same registered and obtained possession of the land pursuant to the same agreement. Thereafter, the Assistant Collector, Jamnagar issued a show cause notice by registering breach of condition Case No.27 / 89 alleging that the petitioner has committed a breach of the condition of the grant and therefore, notice under Section 79 [a] of the Code is issued, against which the petitioner had filed written objections. Therefore, the Assistant Collector after hearing the respective parties rejected the objections submitted by the petitioner and passed order of confiscation of the land and summary eviction of the petitioner from the land in question. Thereafter, the petitioner had preferred appeal against the said order passed by the Assistant Collector before the Collector, Jamnagar being Appeal No.68 / 1989 and drawn the attention of the Collector, Jamnagar in respect of the judgment delivered by the District Judge, Jamnagar in Regular Civil Appeal No.114 / 1981 dated 7th September, 1982 wherein identical matter as well as questions were examined by the District Judge and ultimately come to the conclusion that in such situation, where agreement does not contain condition in Form-I, then by alienation of the entire land, there can be no breach of condition of the agreement and by that judgment and order of confiscation and summary eviction passed under Section 79-A was set aside. However, it is the case that the said matter so decided by the District Judge, Jamnagar is also from the Jamnagar District. However, despite all these averments and contentions before the Collector, Jamnagar, who in turn dismissed the

Appeal preferred by the petitioner by order dated 29th October, 1990 while confirming the order passed by the Assistant Collector, Jamnagar dated 27th June, 1989. Thereafter, the petitioner has approached the revisional authority by way of revision application before the Gujarat Revenue Tribunal being Revision Application No.1/1991. However, the Tribunal has also rejected the said revision application submitted by the petitioner by order dated 25th July, 1995. This is that order of the tribunal challenged by the petitioner by way of this petition before this Court along with the orders passed by the Asstt. Collector and the Collector of Jamnagar District.

#. Mr.Mehul S. Shah, learned advocate for the petitioner and respondent NO.2 has pointed out certain relevant dates in respect of the subject matter, which are referred as under :-

=> The agreement got executed from the respondent No.2 by the Mamlatdar, Jamnagar in the prescribed Form No.F/1 dated 2nd February, 1965.

=> Registered agreement for sale of the land entered into between the petitioner and the respondent on 2nd February, 1985.

=> After period of four years, i.e. on 6th March, 1989 a show cause notice issued by the Assistant Collector, Jamnagar under Section 79 [a] of the Bombay Land Revenue Code by registering a Breach of Condition Case No.27 / 1989 on the basis of agreement to sell.

=> The Assistant Collector has passed order on 27th June, 1989 coming to the conclusion that breach of condition has been established and order of confiscation of the land and summary eviction of petitioner therefrom.

=> The Collector, Jamnagar has passed order in appeal No.68 / 89 by order dated 29th October, 1990 and final order has been passed by the Tribunal in Appeal on 25th July, 1995.

#. In view of above set of facts and circumstances, Mr.Mehul S. Shah, learned advocate for the petitioner has submitted that the lower authorities have committed an apparent error in construing the agreement or undertaking which is placed on record as Annexure-A and also committed error in appreciating the provisions of

Rule 37 read with Condition No.1 of the agreement. Mr.Shah, learned advocate has further submitted that rule 37 read with undertaking given by the respondent No.2 which is at Annexure-A, it is clear that this not the case in which it can be said that the petitioner has committed a breach of condition of agreement. It is further submission that as per the agreement Annexure-A, there can be no order of confiscation of the land in question and summary eviction of the petitioner thereof on the basis of the fact that the respondent No.2 has agreed to sell the entire land to the petitioner by an agreement between the parties and the said agreement is a duly registered and accordingly possession of the land has already been handed over to the petitioner. He also submitted that Section 79[a] of the Bombay Land Revenue Code is also not attributed and therefore the order passed by the Assistant Collector is illegal. He also submitted that such orders passed by the Assistant Collector is unauthorised and wholly without any jurisdiction and the same is passed in violation of Article 14 of the Constitution of India. It is also his submission that the Assistant Collector while passing the order has committed error in considering the fact that the land was allotted to the respondent No.2 as new tenure which implies not transferable land and therefore when there was no such condition is incorporated in the undertaking given by the respondent No.2, then such condition of allotment order cannot restrict the transfer of the entire land to the petitioner. Therefore, the lower authorities though taken into account the conditions of the allotment of the land in question granted in favour of the respondent No.2 but clearly not considered the relevant condition of the undertaking given by the respondent No.2 by filing Form No.F/1 which is produced at Annexure-A. Therefore, when the land has been allotted to the respondent No.2 with a specific condition that the entire land can be transferred but not to divide in parts and therefore, the lower authority has committed an error in only considering the conditions of the allotment order and not considering the undertaking given by the respondent No.2 which is admittedly a statutory undertaking required by the concerned authority at the time of allotment of the land to the respondent No.2. Similarly, the Gujarat Revenue Tribunal has also relied upon the Condition No.1 of the allotment order dated 5th July, 1964, whereby 10 acres and 19 gunthas of the land in question has been given to the respondent No.2 on new tenure and impartible land, however, the same in clear terms suggests that not to be divided the land given to the respondent No.2 as the same is new tenure land. Therefore, this aspect only has been examined by

the Tribunal and contention which was raised by the petitioner in respect of the Form No.F/1 has been grossly ignored by the tribunal and therefore, Mr.Shah, learned advocate has relied upon Rule 37 [a] read with Form No.F/1 and also relied decision of this Court in case of CHHOTABHAI D. THAKORE VS. STATE OF GUJARAT reported in 38 GLR 1997 pg.2016 . Simultaneously, he also relied upon the decision rendered by the District Judge, Jamnagar in Regular Civil Appeal No.114 / 1981 dated 7th September, 1982 and the decision of the Gujarat Revenue Tribunal in Appeal No.17 / 1992 dated 24th October, 1994. The petitioner has also placed on record both the orders viz. one passed by the District Judge, Jamnagar and the another by the Tribunal as referred to hereinabove.

#. Learned AGP Mr.S.P.Sen appearing on behalf of the respondents has submitted when the land in question has been sold to the petitioner by the respondent No.2 without prior permission of the Collector, in that case, the lower authorities have rightly come to the conclusion and accordingly arrived at finding that the there was a breach of condition of the allotment of the order granted in favour of the respondent No.2. Therefore, fact remains that no prior sanction of the Collector has been obtained by the respondent No.2 before selling the land to the petitioner. Mr.Sen, learned AGP has also submitted that no doubt that Form No.F/1 read with Rule 37 [a] wherein, question of transfer is not included but the other relevant Rules of Bombay Land Revenue Code are required to be complied with by the respondent No.2, have not been complied with while entering into transaction with the petitioner in respect of the land in question. Therefore, it is his submission that one of the conditions or rules provided in Bombay Land Revenue Code that in such situation, prior permission from the Collector is necessary and in absence of permission, such transaction is considered to be illegal and void and therefore, the lower authorities have rightly examined the matter considering Condition No.1 of the allotment order and when the land is allotted on new tenure basis, then such land cannot be transferred to anyone without obtaining prior permission from the concerned authority. Therefore, Mr.Sen, learned AGP has submitted that no error has been committed by any of the authority and hence the present petition deserves to be dismissed.

#. I have considered the submissions made by the learned advocates for the parties. Considering the facts of this case, it is felt that the provisions of relevant Rule 37 of the Bombay Land Revenue Rules, 1921, requires to be referred and therefore, the same is referred hereunder:-

"37. Survey numbers how to be disposed of :-

[1] Any unoccupied survey number not assigned for any special purpose may, at the Collector's discretion, be granted for agricultural purposes to such person as the Collector deems fit, either upon the payment of a price fixed by the Collector, or without charge, or may be put to public auction and sold subject to his confirmation to the highest bidder.

[2] In the case of such grants an agreement in Form F shall ordinarily be taken from the person intending to become the occupant,

[3] When the land is granted on inalienable tenure the clause specified in Form I shall be added to the agreement.

[4] When the land is granted on impartible tenure an agreement in Form F[1], and, when it is also granted inalienable tenure, an agreement in Form I[1], shall ordinarily be taken from the person intending to become the occupant.

[5] The declaration below the agreement shall be subscribed by at least one respectable witness and by the patel and village accountant of the village in which the land is situate. "

Thus, clause [2] of Rule 37 clearly provides that in the case of such grants an agreement in Form F shall ordinarily be taken from the person intending to become the occupant, whereas, Clause [3] provides that when the land is granted on inalienable tenure the clause specified in Form I shall be added to the agreement. Similarly, Clause [4] provides that when the land is granted on impartible tenure an agreement in Form F[1], and, when it is also granted inalienable tenure, an agreement in Form I[1], shall ordinarily be taken from the person intending to become the occupant.

#. Therefore, it is the discretionary powers of the Collector, as provided under Rule 37 [1], on which condition the land has been allotted or which type of agreement is required to be obtained from the respondent No.2 and accordingly, he is to take decision and therefore, when the Collector having discretionary powers under Rule 37 [1] and therefore, three different situations have been provided under Rule 37 [2] and [4].

So far as the present case is concerned, the Collector, Jamnagar has exercised the discretionary powers and decided to have agreement for granting the land on impartible tenure to the respondent No.2 and accordingly the undertaking of the respondent No.2 has been obtained in Form F[1] and not in Form I[1]. It is pertinent to note that Form F[1] and Form I[1] are different and independent agreement and its ultimately discretionary powers of the Collector either to impose any such conditions or to impose both conditions as provided in Rule 37 [2]. In light of these provisions, when the land was allotted to the respondent No.2, at that time, considering the relevant provisions of Rule 37[4], a specific Form F[1] has been obtained from the respondent No.2 which is at Annexure - A, wherein a specific condition has been incorporated which is referred as under :-

" .....

> The said land has been granted to me in perpetuity from the 3rd day of December, 1964 subject to [1] the provisions of the Bombay Land Revenue Code, 1879 and the Rules in force thereunder and to [2] the further conditions that, I my heirs, assignees and legal representatives shall not at any time by partition, inheritance, lease, mortgage or otherwise howsoever transfer the said land except as a whole or allow any portion of it to be cultivated used or occupied by any other person so as to divide it."

#. Looking to the above condition, it is specifically agreed and undertaken by the respondent No.2 while receiving the grant of the land in his favour that he, his heirs and legal representations shall not at any time by partition, inheritance, lease and mortgage or otherwise transfer the said land except as a whole or allow any portion of it to be cultivated used or occupied by any other person so as to divide it. Therefore, the land has been granted in favour of the respondent No.2 considering the provisions of Rule 37 [4] first part that the land has been granted to the respondent No.2 by Collector exercising his discretionary powers of impartible tenure in prescribing Form F[1] is not imposed any condition about inalienable tenure which prescribed in Form I[1]. Therefore, on the relevant time, the Collector has decided not to take the undertaking in Form

I[1]. Therefore, the present case is required to be examined in light of the condition which incorporated in undertaking Form F[1] and not required to be considered the conditions of the allotment imposed at the time of allotting the land in favour of the respondent No.2. Because the respondent No.2 has agreed that he will not partition the land in question by way of inheritance, lease, mortgage or otherwise by way of transfer the said land except as a whole or allow any portion of it to be cultivated, used or occupied by any person so as to decide it. Therefore, no condition has been incorporated in Form F[1] about inalienable tenure. In light of this factual aspect read with relevant Rule 37 [4] and considering the condition incorporated in Form F[1], the view taken by the District Judge in similar matter while dealing with Regular Civil Suit No. 114 / 1981, observations in paras-21 to 24 are quoted as under :-

"21. Form No.F-1 provided under Rule 37[4] of the Bombay Land Revenue Rules, 1921 is in respect of the land of impartible tenure. Form F-I is the form of the agreement to be passed by the persons intending to become occupants of the land of impartible tenure. The form clearly says that the grantee or the occupant and his heirs and legal representatives shall not at any time by partition, inheritance, lease, mortgage, sell or otherwise, howsoever, transfer the said land except as a whole or allow any portion of it to be cultivated, used or occupied by any other persons so as to divide it.

22. Form - I provided under Rule 37[3] and Rule 43[3] of the abovesaid Rules, 1921 is in respect of the inalienable tenure land. It provides a clause for inalienable tenure additionally to Forms F and H and other agreements. The additional Clause provided under Form - I runs thus :

"The said land has been granted to me subject to the condition to which I hereby assent, namely, that I, my heirs, executors, administrators and approved assigns my not at any time lease, mortgage, sell or otherwise nowsoever encumber the said and or any portion thereof without the previous sanction in writing of the Collector and subject to such further conditions as the Collector may while according such sanction impose in that behalf."

23. Form I-I which is provided under Rule 37[4] of the abovesaid Rules of 1921 is in respect of the lands which are both of inalienable and impartible tenures.

24. Therefore, it becomes clear that three separate forms have been provided depending upon the tenure under which the land is granted. In the instant case, it is abundantly clear that Form F-1 is used saying that the land is of impartible tenure only. It must further be appreciated that the additional clause provided under Form F-I has not been included int he abovesaid Form at Exh.89. In the same way, Form I-I not at all executed by the parties. Therefore it is abundantly clear that the land under dispute was only of impartible tenure and that as the land is of impartible tenure, it cannot be portioned or transferred by inheritance, lease, mortgage or otherwise except as a whole. In the instant case, it is an admitted position that the land as a whole, namely entire area of 10 Acre is transferred by way of exchange and therefore, the condition attached to the land by way of impartible tenure has not been violated."

##. Similarly in identical case, the Gujarat Revenue Tribunal in appeal No.17/92 decided on 24th October, 1994 has also taken similar view after considering Rule 37[4] read with Form F[1] and ultimately come to the conclusion in para-7, which runs as under :-

"The above clause is to be added in the agreement in Form No.F-1. Apparently there is no condition that the suit land in inalienable. Hence the above condition will not bind Kahabhai Kalabhai. In the result, there was absolutely no bar on Lakhanbhai Kalabhai to sell the suit land under the agreement executed by him or under the terms and conditions under which the suit land was granted to him."

Thus, the Tribunal has observed that if the Collector desires to have condition of inalienable, in that case, Form I[1] is required to be obtained from the respondent. Therefore, when no such undertaking was obtained except the Form F[1], the tribunal has come to the conclusion that the sale deed of the suit land is not violated any terms and conditions of the allotment of the land and undertaking given by said land holder.

##. It is also necessary to consider the view taken by this Court in a reported decision 1997 [3] GLR 2016, wherein the condition of new tenure is incorporated has been examined by this Court. In the present case, Gujarat Revenue Tribunal in his order has relied upon the condition No.1 of the allotment order, whereby the land has been given to the respondent No.2 as the new tenure but not clearly clarified that new tenure, in other words, not transferable without prior permission of the Collector. The observations made by this Court in the aforesaid decision are reiterated as under :-

> "....To reach to this conclusion the matter may be looked at from another angle. Necessary entries in the revenue record in favour of the petitioner with regard to the land land in dispute has been made in the year 1973 by the competent officer. At that time also it has not been noticed by the office concerned that this land is inalienable or impartible. The petitioner is a bonafide person who entered in possession and regarding his right, title and interest he has taken immediate steps for getting necessary correction of the entry in the revenue records. The delay in initiating action against the petitioner has assumed importance in the facts of the case, though delay in each case may not vitiate the action. But in the given case the delay in initiation of action may certainly vitiate the action. It is settled law that an action, where no limitation is prescribed for taking thereof, should be initiated within reasonable time. What is reasonable time is not given out, but in the present case, where name of the petitioner has been entered in the revenue record, in respect of the land, way back in the year 1973, the action which has been initiated in the year 1982 cannot be said to be within reasonable time. It is not the case of the respondents that the petitioner has committed some fraud or that he got the entry fraudulently or he made some misrepresentation and got favourable orders. It is a case where the respondents have not given out any explanation, good, bad or indifferent, for delayed initiating action against the petitioner. So, the delay coupled with the fact that the land has been mutated in the name of the petitioner in the year 1973, and further that in the revenue record only the words `new tenure' are mentioned, suggests

> that the action initiated against the petitioner cannot be allowed to stand. The Counsel for the respondent does not dispute that new tenure lands are also alienable and partible, though with the prior approval of the competent authority. The Counsel for the respondents, when asked by the Court, very fairly submitted that transfer is permissible on payment of certain premium. None of the Counsels for the parties is able to give out what actual amount has to be paid in the present case by way of premium. But the fact remains that the land was transferable on approval of the authority. Nothing as such has been stated against the petitioner except that the transfer has been made without prior sanction of the authority. Taking into consideration the totality of the facts of this case, the order passed by the authorities below cannot be allowed to stand."

##. In light of above observations made by this Court as well as considering the decision of the District Judge, Jamnagar and Gujarat Revenue Tribunal as referred to hereinabove and after perusal of the orders impugned in the present case passed by the lower authorities, wherein the important aspect is Rule 37 [4] and condition incorporated in Form F[1] has been executed and considering the condition [1] of the allotment order that land has been allotted to the respondent No.2 as new tenure, the order of confiscation has been passed as the petitioner has not obtained prior permission or sanction from the Collector. It is also necessary to consider one another aspect of the present matter that registered agreement for sale of the land was entered into between the petitioner and the respondent No.2 on 2nd February, 1985 and necessary entries were made in the revenue record and thereafter, after lapse of four years on 6th March, 1989 a show cause notice was issued by the Assistant Collector under Section 79[a] of the Bombay Land Revenue Code. Therefore, there was delay initiating the proceedings by the respondent authority. Therefore, considering the matter from the delay point of view, it is clear that the necessary entries in the revenue record in favour of the present petitioner with regard to the land in dispute were made in the year 1985 by competent officer. At that time also, it is not noticed by the officer concerned that this land is inalienable or impartible. The petitioner is a bona fide purchase who entered in possession and regarding his right, title and interest, he has taken immediate steps for getting the necessary correction of the entries in the revenue

records. Delay in initiating the action against the petitioner also assumes importance in the facts of the case though delay in each case may not vitiate the action. But in a given case, delay in initiation of action may certainly vitiate the action. It is settled law that an action where no limitation is prescribed taking thereof, the action should be initiated within reasonable time. What is reasonable timer is not given out but in the present case, where the name of the petitioner has been entered in the revenue record in respect of the land in question in the year 1985 pursuant to the transaction and the action has been initiated in the year 1989, obviously cannot be said to be within reasonable time. It is not case of the respondents that the petitioner has committed some fraud or that he got entry fraudulently or he had made misrepresented and got favourable orders. It is a case where respondents have not given out any explanation, good, bad or indifferent, for delayed initiating action against the petitioner. No affidavit has been filed by the respondents, therefore, delay coupled with the fact that the land has been mutated in the name of the petitioner in the year 1985 and revenue record only the words `new tenure' are mentioned, suggests that the action initiated against the petitioner cannot be allowed to stand. However, it is also necessary to note that mentioning of new tenure land which are also inalienable and partible though with the prior approval of the competent authority. Even in such case, transfer is permissible on payment of certain premium. Therefore, considering this aspect also, if the matter has been looked into from different angle, in that case, despite of the condition of new tenure though exists in the order of allotment, then under Section 43 the transfer is permissible with permission of the Collector. Therefore, ultimately the petitioner has to pay premium upon such transaction of the land in question because transfer has been made without prior sanction of the authority.

##. Taking into consideration the totality of the facts of this case and the orders passed by the below authorities, wherein condition [1] of the allotment order of the land in favour of the respondent No.2 which suggested of new tenure land has been only taken into account ignoring the undertaking Form F[1] given by the respondent No.2 read with Rule 37 [4], when the Collector has exercised the discretionary powers not to impose the condition of inalienable, then such condition only taking into account from the allotment order and to pass order of confiscation is basic error committed by the below authorities in view of the fact petitioner is bona fide

purchaser and therefore, the orders passed by the below authorities cannot be allowed to stand.

##. In the result, this petition succeeds and same is allowed. The order passed by the Assistant Collector in Breach of Condition Case No.27 / 1989 dated 27th June, 1989 and order passed by the District Collector, Jamnagar in Appeal No.68 / 89 dated 29th October, 1990 so also the order passed by the GRT in Application No.1/91 dated 25th July, 1995 are hereby quashed and set aside. However, the Collector, Jamnagar is directed to determine the amount of premium in respect of the land in dispute at the rate prevailing at the relevant time of 1985 for the transaction carried out between the parties, within period of three months from the date of receiving the certified copy of this judgement and order. It is also observed that the petitioner is under obligation to pay the amount of so determined immediately on receipt of the demand from the Collector and the petitioner cannot be allowed to retain the amount of premium and he has to pay such amount that may be determined by the Collector, Jamnagar as directed above, for the transfer of the land in question which is new tenure land. Rule is made absolute in the aforesaid terms with no order as to costs.

Date : 20-9-2001 [H.K.Rathod, J.]

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